Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

(3)

No. 94-304

In The

Supreme Court of the United States

October Term, 1994

VILLAGE OF OCONOMOWOC LAKE,

Petitioner,

v.

DAYTON HUDSON CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S BRIEF IN REPLY

WILLIAM S. ROUSH, JR.*
KATHRYN A. LONSDORF

Counsel for the Petitioner Village of Oconomowoc Lake

DAVIS & KUELTHAU, S.C.
111 East Kilbourn
Suite 1400
Milwaukee, Wisconsin 53202
414-276-0200

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

I. The Decision Of The Court Of Appeals Is Not Merely Dicta 1

II. This Case Is Not "Moot" Under Any Circumstances 4

A. Completion of Construction Does Not Preclude the Granting of Effective Relief 4

B. The Need For A Storm Water Operating Permit Has Never Been Determined 6

III. The Pendency Of Potential Legislation Is Not Material To The Issues In This Case 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970) 8

Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990) 6

Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) 5

Chesapeake Bay Foundation v. Gwaltney of Smithfield, 890 F.2d 690 (4th Cir. 1989) 6

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9

Church of Scientology of California v. United States, ___ U.S. ___, 113 S.Ct. 447 (1992) 4

Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) 5

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 4

Dague v. City of Burlington, 935 F.2d 1343 (2nd Cir. 1991) 2

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 4, 6

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) 2

Hopt v. Utah, 114 U.S. 488 (1885) 8

Mills v. Green, 159 U.S. 651 (1895) 5

United States v. Crawley, 837 F.2d 291 (7th Cir. 1988) 1

Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986) 5

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994) 2, 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1365 4
42 U.S.C. § 7604(a)(1) 3

FEDERAL REGULATIONS

40 C.F.R. § 122.26(b)(14)(viii) 6
40 C.F.R. § 122.26(b)(14)(xi) 6

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Is Not Merely Dicta.

The Respondents, the City of Oconomowoc and Dayton Hudson Corp.,[1] argue that the holding of the Court of Appeals regarding the limited scope of the Clean Water Act is merely "dicta." To the contrary, the Seventh Circuit knows dicta when it reads it, having expounded at length on how to recognize dicta and why it occurs in *United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988). The decision of the Court of Appeals in this case satisfies none of the criteria for recognizing dicta established by the Seventh Circuit itself.

The Court of Appeals' pronouncement on the limited scope of the Clean Water Act was not an off-hand or ill-considered statement of illustration, or an aside, unnecessary to its holding. The Court of Appeals answered the precise question identified by the Respondents as the question to be answered by the Court of Appeals respecting the Petitioner's Clean Water Act Claim:

> (2) Does the federal Clean Water Act require a permit for the discharge of stormwater to groundwater?
>
> **Answered by the District Court: No.**

Joint Brief of the City of Oconomowoc and Target Stores, a Division of Dayton Hudson, "Statement of Issues," p. 6, Court of Appeals No. 93-3380 (December 23, 1993) (emphasis in original).

---

[1] The State Respondents, George Meyer and the Wisconsin Department of Natural Resources filed a waiver of their right to file a responsive brief. As used herein, "Respondents" refers only to the City of Oconomowoc and Dayton Hudson Corporation.

The Court of Appeals was not, however, uninformed of the "defective notice" argument now being made by the Respondents on the basis of *Hallstrom v. Tillamook County*, 493 U.S. 20, 29-31 (1989).[2] Although the Respondents did not identify any "defective notice" issue in their "Statement of Issues" in the Court of Appeals, they did brief and argue *exactly* the same point in the Court of Appeals as an alternative theory for affirming the decision of the trial Court.[3] The Court of Appeals simply chose not to accept, rely on or even discuss the Respondents' "defective notice" argument regarding the Clean Water Act claim. Instead, the Court of Appeals firmly and quite unequivocally construed the Clean Water Act and narrowly circumscribed its limits.

Perhaps, since the Respondents did not identify any "defective notice" issue in their "Statement of Issues" respecting the Clean Water Act, the Court of Appeals felt they had waived the issue or did not see fit to address issues that were not properly raised or identified by the Respondents. Perhaps, the Court of Appeals concluded that the decision in *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2nd Cir. 1991), was clearly correct, clearly applicable, and required no further elaboration or discussion. For whatever reason, the Court of Appeals' construction of the limited coverage of the Clean Water Act was not only essential to its disposition of the Petitioner's Clean Water Act claim, it was the *only* basis for the Court of Appeals' decision affirming the dismissal of the Clean Water Act claim. *Village of Oconomowoc Lake v. Dayton*

---

[2] *Brief of Respondents City of Oconomowoc and Target Stores, a Division of Dayton Hudson Corporation in Opposition*, pp. 9-13, hereafter cited to as "*Brief of Respondents.*"

[3] *See, e.g., Joint Brief of the City Oconomowoc and Target Stores, a Division of Dayton Hudson*, pp. 44-45, Court of Appeals No. 93-3380 (December 23, 1993).

Hudson Corp., 24 F.3d 962, 964-66 (7th Cir. 1994); [App. 6a-9a]. The holding was not mere dicta, as argued by the Respondents.

Unless one can reasonably conclude that the Petitioner and the courts subordinate to the Seventh Circuit Court of Appeals are free to completely disregard that portion of the decision relating to the Clean Water Act, the Court of Appeals' definitive construction of the Clean Water Act is not "dicta." Petitioner submits that no reasonable person could reach such a conclusion. Certainly, Respondents would be the first to scream "foul" if the Petitioner were to refile its Clean Water Act claim, even after giving a fresh notice and waiting sixty days.[4] Given the stern tenor of the Court of Appeals' decision and the daunting potential for being sanctioned for bringing a similar claim, it is unlikely that any other citizen would dare bring such a claim in the trial courts subordinate to the United States Court of Appeals for the Seventh Circuit and then dare to argue that the Court of Appeals' decision was merely "dicta."

The Petitioner has not mischaracterized the question presented by the decision of the Court of Appeals in this case. Rather, the Respondents' "dicta" argument is a poor substitute for the Respondents properly raising their defective notice theory in the Court of Appeals in the first instance, or in this Court by the filing of a cross-petition for a writ of certiorari in a timely fashion pursuant to Rule 12.3. Having failed to properly raise the issue before, the Respondents should not be allowed to raise the issue now, through specious argument.

---

[4] As suggested by the Court of Appeals, the Petitioner issued and served an amended notice of its intent to institute suit under 42 U.S.C. § 7604(a)(1) on May 20, 1994, which is why the Petitioner is not seeking review of the Court of Appeals' holding with respect to the Petitioner's Clean Air Act claim.

II. This Case Is Not "Moot" Under Any Circumstances.

The Respondents' mootness argument is meritless, but troubling. At the same time that Respondents criticize the Petitioner for fully informing the Court of the proceedings below and including documents in the appendix to the Petition that were filed with or issued by the Court of Appeals, *Brief of Respondents*, pp. ii-iii, the Respondents seek to introduce new affidavits and correspondence into the record. To make matters worse, Respondents then mischaracterize the new "facts" established by the recently prepared affidavits. Notwithstanding the new material inappropriately submitted for the first time in this Court, however, it is plain that this case is not moot.

A. Completion of Construction Does Not Preclude the Granting of Effective Relief.

Conceding that they never received the preconstruction storm water discharge permit required by the Clean Water Act, the Respondents first contend that their ability to construct the Target Distribution Center faster than the courts could adjudicate the Petitioner's citizen suit claim renders the case "moot" because the Respondents' Clean Water Act violations are now "wholly past" under *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), which concerned the subject matter jurisdiction of the trial court to entertain a citizen suit under 42 U.S.C. § 1365 based on the defendant's state of compliance at the time the complaint was filed.

It has been well established by this Court that the Respondents' burden of proving mootness is a heavy one, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This Court has also pointed out that a case is only moot when, "an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of*

Scientiology of California v. United States, ___ U.S. ___, 113 S.Ct. 447, 449 (1992), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895). In this case it is still entirely possible for the courts to grant the Petitioner very effective relief, whether it be injunctive relief or civil penalties, if it prevails on the merits of its claims.

As the Court of Appeals for the Seventh Circuit has held in rejecting a mootness argument almost identical to that of Respondents:

> As a threshold matter, we do not agree with Fornell's suggestion that this court no longer has jurisdiction because construction of the facility has begun. . . . If plaintiffs and the attorney general were to succeed in showing that the permit had to be revoked or modified, we presumably could order that the facility be dismantled, altered or operated differently. [citations omitted] Thus, this appeal is not moot.

Van Abbema v. Fornell, 807 F.2d 633, 636-637 (7th Cir. 1986), citing *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) and *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). Since to this day the Respondents have never received the storm water permit that was necessary to authorize construction of the Target Distribution Center, it is still possible for the courts to grant the Petitioner any of the forms of injunctive relief identified in *Van Abbema*.

Even if the Respondents had applied for and received the proper permits or had otherwise been able to purge themselves of their Clean Water Act violations after the commencement of the action in the trial court, the potential award of civil penalties for the ongoing violations that were occurring and have continued to occur since the complaint was filed in this action would prevent this case from being moot. This was precisely the holding by the

Fourth Circuit Court of Appeals upon the remand of this Court's decision in *Gwaltney, supra,* after the Court of Appeals had concluded that the commencement of the underlying suit was premised upon a good faith allegation of an ongoing violation:

> In our view, the penalty factor keeps the controversy alive between plaintiffs and defendants in a citizen suit, even though the defendant has come into compliance and even though the ultimate judicial remedy is the imposition of civil penalties assessed for past acts of pollution.

Chesapeake Bay Foundation v. Gwaltney of Smithfield, 890 F.2d 690, 696 (4th Cir. 1989). The reasoning of the Fourth Circuit Court of Appeals was followed and expanded upon by the Eleventh Circuit in *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1134-37 (11th Cir. 1990).

B. The Need For A Storm Water Operating Permit Has Never Been Determined.

The second prong of Respondents' mootness argument should be rejected because: (1) it is based on new affidavits and correspondence outside of the record; (2) the Respondents' representations regarding a determination by the State, that no operating permit is needed, is demonstrably false from the text of the correspondence itself; and (3) the basis for Respondents' new theory is Dayton Hudson's creative but unreasonable legal argument, that a 1.1 million square foot facility, with parking for over 700 semi-trailers, that is devoted exclusively to the receiving and shipping of goods via up to 444 semi-trucks per day, and at which nothing is ever sold to anyone, is really a retail "Department Store" rather than a warehouse associated with transportation. *See, e.g.,* 40 C.F.R. § 122.26(b)(14)(viii) and (xi).

It is fairly clear that the only people who have concluded anything about Dayton Hudson's need for an operating storm water permit are Dayton Hudson's lawyers. *Brief of Respondents,* App. 3. In response to Dayton Hudson's request for a written determination that no permit was required, a representative of the Wisconsin Department of Natural Resources wrote on February 11, 1994:

> *The Department has not and cannot make individual judgments regarding the appropriate SIC code for all such facilities. We must rely on the facility owners to properly identify which SIC codes apply to their facilities.* Nevertheless, presuming that the Target Midwest Distribution Center is appropriately classified a Industry No. 5311, we would agree that it does not required a permit under our draft administrative code as presently written.

Brief of Respondents, App. 6 (emphasis added). In response to Dayton Hudson's lawyers' renewed request on September 14, 1994,[5] for a written determination of the facility's exempt status, the same representative of the Wisconsin Department of Natural Resources wrote back on September 15, 1994:

> . . . SIC Code No. 5311 was not added as an industrial sector requiring stormwater permit coverage for facility operation. Consequently, subject to one qualification, *if the Target Midwest Distribution Center is appropriately classified under that number, no stormwater permit need be applied for or obtained.*

Brief of Respondents, App. 10 (emphasis added).

---

[5] The *Petition for Certiorari* was filed with this Court and served upon the Respondents by regular mail on August 16, 1994.

Contrary to Respondents' arguments, couched in representations of "fact" to this Court, the "fact" appearing from the face of the correspondence is that the Wisconsin Department of Natural Resources *refused* to make any determination on how to categorize Dayton Hudson's facility under the SIC codes, making any "determination" entirely dependent on Dayton Hudson's self-classification. *Cf. Brief of Respondents*, pp. 7, 16. The fact is, the Respondents concede that they have never applied for and have never received an operational storm water permit.

It is entirely inappropriate for the Respondents to ask this Court to engage in fact finding on the basis of new affidavits and contentious arguments that are not well founded in the record. *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157-58, n.16 (1970). Nor should the Court of Appeals' decision in this case evade the review it deserves based on Respondents' attempt to have this Court engage in fact finding, on the basis of snippets of disputed deposition testimony, when even the trial court in this case was unwilling to make factual determinations at the very early stage at which this case was dismissed. *Decision and Order*, pp. 3-4, n.2, 6-7, n.3 [App. 15a-16a, 18a-19a]. *Cf., Brief of Respondents*, pp. 20-21.

The question presented by the decision of the Court of appeals is purely a legal one, and it is extremely narrow. The issue that has been properly presented, regarding the proper scope of the Clean Water Act, should be reviewed by this Court. Trials and fact finding are for trial courts.

III. The Pendency Of Potential Legislation Is Not Material To The Issues In This Case.

As the Court of Appeals itself noted, negative legislative history is particularly unpersuasive in construing statutes. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); [App. 8a]. Speculation as to the import of legislative history "in the making" is even less persuasive as a reason to deny the requested writ in this case to review the decision of the Court of appeals. *Cf., Brief of Respondents*, pp. 24-26. If congress passes the legislation referred to by Respondents, and thereby ratifies U.S. EPA's authoritative interpretation of the Clean Water Act, the issue presented in this case will still remain with respect to the state of the law at the time this action was commended. If the legislation is not passed, it is likely due to the fact that the legislators felt it was not particularly necessary to expend the political energy to ratify U.S. EPA's construction of the Clean Water Act given this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In either case, the important reasons for granting the requested writ to review the Court of Appeals' decision will still remain.

Unless Congress enacts a statute, with retroactive effect, unequivocally stating that U.S. EPA is prohibited from regulating the "discharge of any pollutant" to waters of the United States that occur through shallow, hydrologically connected groundwaters, the construction of the scope of the Clean Water Act by U.S. EPA remains undisputed and most likely dispositive of the issue that has been properly presented by this case, according to this Court's decision in *Chevron*. It is immaterial whether Congress chooses to ratify U.S. EPA's construction of the Clean Water Act or continue to defer to U.S. EPA's interpretation. What is material is the fact that the Court of

Appeals did not defer to the agency's interpretation, as it should have done in this case.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the *Petition for a Writ of Certiorari*, the Petitioner urges this Court to issue the writ, review the Court of Appeals' decision, and reverse it.

Respectfully submitted,

WILLIAM S. ROUSH, JR.*
KATHERYN A. LONSDORF

DAVIS & KUELTHAU, S.C.
111 E. Kilbourn
Suite 1400
Milwaukee, WI 53202
(414) 276-0200

*Counsel of Record